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89- 1440

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

KNOX COUNTY, TENNESSEE AND SHERIFF JOE FOWLER in his official capacity,

PETITIONERS/DEFENDANTS/
CROSS PLAINTIFFS

vs. NO._____

GOVERNOR NED RAY McWHERTER, COMMISSIONER, W. JEFF REYNOLDS, AND EXECUTIVE DIRECTOR DEBORAH MILLER, in their official capacities,

RESPONDENTS/DEFENDANTS/
CROSS DEFENDANTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW GOVERNING CORRECTIONAL INSTITUTIONS, WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, WHERE IT EXPRESSLY AUTHORIZED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW STATE DEPARTMENTS OF CORRECTION WITHIN THE SIXTH CIRCUIT TO DELIBERATELY ALLOW INMATES SENTENCED TO STATE CUSTODY TO BACK UP AND LANGUISH FOR YEARS AT A TIME IN LOCAL COUNTY JAILS NOT DESIGNED FOR LONG TERM CONFINEMENT?

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS' DECISION RENDERED IN THIS CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN BENJAMIN vs. MALCOM, 803 F.2d 46 (2nd CIR. 1986), AS WELL AS PRIOR SIXTH CIRCUIT PRECEDENT, WHERE FULL RELIEF FOR THE THIRD PARTY PLAINTIFF'S AND ORIGINAL INMATE PLAINTIFFS FOR UNCONSTITUTIONALLY OVERCROWDED LOCAL JAIL FACILITIES IN KNOX COUNTY, TENNESSEE CANNOT BE OBTAINED WITHOUT UPHOLDING THE PRECISELY TAILORED REMEDY IMPOSED BY THE DISTRICT COURT AGAINST THE ONLY PARTY RESPONSIBLE FOR AND CAPABLE OF RECTIFYING SUCH UNCONSTITUTIONAL OVERCROWDING?

3. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS WHERE THE COURT OF APPEALS REVERSED THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING THIRD PARTY "STATE" DEFENDANTS' ROLE IN PROXIMATELY CAUSING UNCONSTITUTIONAL CONDITIONS IN KNOX COUNTY

JAIL FACILITIES WITHOUT REQUESTING OR REVIEWING THE TRANSCRIPT OF THE EVIDENCE IN THE DISTRICT COURT AND RATHER BY SUA SPONTE TAKING JUDICIAL NOTICE OF "FACTS" NOT CONTAINED IN THE RECORD?

4. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS, WHERE THE PANEL DECIDED THE CASE ON ITS MERITS AFTER: ONE OR MORE OF THE MEMBERS OF THE PANEL WAS PRESENT IN ONE OR MORE SIXTH CIRCUIT RULE 18 SETTLEMENT CONFERENCES WITH SOME OF THE PARTIES; THE PANEL CONVENED A STATUS CONFERENCE ON THE PROPOSED SETTLEMENT; AND STATEMENTS, COMMENTS AND POSITIONS OF THE PARTIES AT THE CONCLUSION OF UNSUCCESSFUL SETTLEMENT NEGOTIATIONS WERE DISCLOSED TO THE PANEL BY BOTH OPPOSING PARTIES AND THE SIXTH CIRCUIT CONFERENCE ATTORNEY?

5. WHETHER THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN HOFFMAN V. BLASKI, 363 U.S. 335 (1960) BECAUSE THE COURT ORDERED VENUE OF THIRD PARTY DEFENDANTS' CLAIM AGAINST THE "STATE" DEFENDANTS TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1404(a) TO THE MIDDLE DISTRICT OF TENNESSEE NOTWITHSTANDING THAT PLAINTIFF CARVER COULD NOT HAVE BROUGHT THIS ORIGINAL ACTION IN THAT DISTRICT, AND THE STATE DEFENDANTS WAIVED ANY RIGHT TO A TRANSFER BY FAILING TO REQUEST ONE UNTIL THE MORNING OF THE LAST DAY OF THE BIFURCATED TRIAL OF THE CASE?

II. LIST OF PARTIES TO THE PROCEEDING

A. **PLAINTIFF WAYNE DILLARD CARVER**, as class representative of all persons who have been or are confined in the Knox County, Tennessee jail facilities, as sub-class consisting of present and future pre-trial detainees, and sub-class consisting of all Tennessee Department of Corrections sentenced prisoners awaiting transfer to the penitentiary;

B. **DEFENDANT/CROSS PLAINTIFF KNOX COUNTY, TENNESSEE AND SHERIFF JOE FOWLER**, in his official capacity.

C. **DEFENDANTS/CROSS DEFENDANTS, GOVERNOR NED RAY McWHERTER, COMMISSIONER W. JEFF REYNOLDS, AND EXECUTIVE DIRECTOR DEBORAH MILLER**, in their official capacities.

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IV. OPINIONS BELOW

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B. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, C.A. Nos. 89-5341/5369 (11/21/89) (Order clarifying opinion and denying Plaintiff's Petition for Rehearing) (unreported but contained in Appendix, p. 2).

C. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, C.A. Nos. 89-5341/5369 887 F.2d 1287 (6th Cir. 1989). (Appendix, p. 6).

D. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, Civ. No. 3-86-299 (E.D. Tenn. 1/28/89) (Order declaring certain conditions in Knox County Jail facilities unconstitutional) (unreported but contained in Appendix, p. 23).

E. Wayne Dillard Carver, et al v. Knox County, Tennessee, et al, v. Ned Ray McWherter, et al, Civ. No. 3-86-299 (E.D. Tenn. 3/17/89) (Order and Memorandum Opinion granting Third Party Plaintiffs relief) (unreported but contained in Appendix, p. 26).

V. GROUNDS FOR JURISDICTION

A. Date judgment entered: 10/6/89

B. Date of denial of Petition for Rehearing: 12/29/89

C. 28 U.S.C. Section 1254

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. 28 U.S.C. Section 1404(a) (Change of Venue):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

B. 42 U.S.C. Section 1983 (Civil Action for Deprivation of Rights):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

C. U.S. Constitution Amendment 8 (Bail Punishment):

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D. U.S. Constitution Amendment 14 (Due Process of Law):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

This case arises from a declaratory judgment of the district court filed January 25, 1989 (Appendix, p. 31), finding conditions of confinement in two of three local jail facilities in Knox County, Tennessee to be unconstitutional,

and from subsequent Order of March 17, 1989 (Appendix, p. 35), expressly finding that the proximate cause of such unconstitutional conditions is the presence of inmates sentenced to the custody of the Tennessee Department of Corrections and accordingly ordering the State to remove some of such inmates from the affected facilities. Plaintiff, Wayne Dillard Carver, initiated this action while incarcerated in the Knox County Jail by filing a complaint in forma pauperis which named only Sheriff Fowler and Knox County. Defendants filed an Answer and Third Party Complaint naming the Governor of Tennessee and various State officers in their official capacities alleging that any unconstitutional conditions existing within Knox County facilities were proximately caused by the State Defendants' failure to promptly take into custody prisoners sentenced to the Tennessee Department of Corrections (hereinafter T.D.O.C.). Subsequent amendments to Plaintiff's Complaint were made by appointed counsel to certify the case as a class action and to name the

State Defendants as Co-Defendants in Plaintiff's original claim. The State Defendants filed Rule 12(b) Motions on two occasions but made no pre-trial objection to venue in the Eastern District of Tennessee. On August 10, 12 and 15, 1988, trial was held on the issue of constitutionality of the conditions in the County Jail facilities. Not until trial on the relief phase, held March 6, 1989, did the State Defendants raise an objection to venue.

Prior to the State's refusal in 1985 to accept T.D.O.C. sentenced inmates into their custody the Knox County Jail facilities had no problem with overcrowding. (R. 174: J. Miller at 157-58; Jack Carter at T.R. 231-32; Charles Miller at T.R. 271; Maurice Eady at T.R. 401). However, the State deliberately allowed over 2,300 inmates to back up in local jail facilities. (R. 173: Jeff Reynolds at T.R. 84-5). At the time of the March 6, 1989 hearing, out of a total inmate population of 501, there were 147 T.D.O.C. ready inmates awaiting transport. (R. 173: Kenneth Quindry at T.R. 22-3).

The rated capacity of the facilities is 435. The prisoner/day growth from fiscal year 1985-86 to 1988-89 has risen 867.75% (R. 173: Kenneth Quindry at T.R. 42). The State has allowed T.D.O.C. sentenced inmates to remain in the Knox County Jail facilities continuously from between six months to two years. (R. 174: Charles Miller at T.R. 262; A.C. Willis at T.R. 240). Notwithstanding that the Commissioner of T.D.O.C. readily admitted that the State should be responsible for these persons and that local jails cannot and should not be used to provide additional capacity needed for serious felons, the State had at the time of the trial completed no new prisons since the 1985 Grubbs Order and added only 300 beds to its entire state prison system with full knowledge of the backup this would cause in local jails. (R. 173: Jeff Reynolds at T.R. 80-81; 84-5; Greg Maynard at T.R. 173-4). In the words of the Commissioner of Corrections for Tennessee, the State's plans regarding housing of prisoners is "We are just going to let it go." (R. 173: Jeff Reynolds at T.R. 86).

In a separate case filed by officials of Hamilton County, Tennessee against the T.D.O.C., styled Roberts v. T.D.O.C., No. 89-5307 (October 5, 1989), which was ordered consolidated with the instant case by Order filed April 4, 1989, Judge Merrit stayed the district court's preliminary injunction which required the State to remove T.D.O.C. sentenced inmates from Hamilton County. In the hearing on the State's Motion for a Stay, Judge Merritt stated his belief that the cause of any overcrowding in the local facility was a de facto conspiracy between local bondsmen and local officials to require modest bonds of indigents notwithstanding that there was no contention nor evidence in the record to remotely suggest this. (See Judge Merritt's ruling from the bench from March 16, 1989 and excerpts of the transcript of proceedings attached as Appendix, 64-5). The panel then consolidated for briefing and hearing the Roberts's case with the instant one. After Judge Jarvis' ruling on March 17, 1989, the State filed a Notice of Appeal and sought a stay which was granted on

March 30, 1989 by a panel of this Court presided over by Judge Merritt.

The panel received extensive briefing on the case and heard oral argument on the merits on May 23, 1989. Judge Merritt again made reference in oral argument to local bondsmen having "mystical power" over Sheriff Fowler although the instant record is devoid of evidence to suggest this and such a belief is contrary to the facts. Knox County was given approximately three minutes to argue its case.

Subsequent to briefing and argument, in an unprecedented Order entered July 11, 1989, the panel requested the Senior Sixth Circuit Conference Attorney to attempt to negotiate a settlement of the two cases. (Appendix, p. 28). Pursuant to this Order, all the parties, including Petitioners herein, had extensive telephonic and in person negotiations. Notwithstanding the mandates of Sixth Circuit Rule 18(3) and (4) and Fed. R. Evid. 408, on September 1, 1989, the counsel for the Plaintiff Class inmates submitted a letter to the judges of the

panel, setting forth their position on the proposed settlement. (Attached as Appendix, p. 50). It was only after the above letter was written to the panel that another letter issued from the Sixth Circuit Senior Conference Attorney advising the Panel that the parties in the Roberts case had reached a settlement and that the Plaintiff class inmates in this case were agreeable thereto but that Knox County was not. (Appendix, p. 55). This letter issued over strenuous objections by Knox County that such revelations to the Panel violated Rule 18 and their right to an impartial hearing on the merits. (Appendix, p. 60).

In similarly unprecedented fashion, the panel ordered all parties to appear in Cincinnati on September 20, 1989 for a hearing on the status of the proposed settlement. Again, disclosure was required regarding the parties' settlement positions. On information and belief, prior to the entry of a final Order by the panel in this case, Judge Merritt attended a meeting between counsel for the State, counsel for Hamilton County, counsel for

the Class of Plaintiff inmates in this case and U.S. District Judge Thomas Higgins and in that meeting discussed substantive matters involving settlement proposals. Counsel for Knox County was notified of this meeting only hours before it convened in Nashville, Tennessee, and were not informed that Judge Merritt would be participating in these negotiations. The panel subsequently issued its opinion on October 16, 1989.

The Court of Appeals issued on November 21, 1989 an Order "clarifying" its reported Opinion and denying Plaintiff's Petition for Rehearing. (Appendix, p. 3). Defendants/Cross Plaintiffs' Petition for Rehearing and Suggestion for Reharing en banc, (Appendix, p. 1), was denied December 29, 1989. (Appendix, p. 2).

By letter dated January 11, 1990, the Clerk of the Sixth Circuit advised the parties that "the certified record was never sent to this Court on appeal. (Appendix, 49). The District Court and the Sixth Circuit Clerk's office confirmed that the Court of Appeals never requested the transcript of evidence heard by the

District Court.

Petitioners' counsel assumed that since appellant ordered the entire transcript of the proceedings that the Court of Appeals would have it to review. However, the District Court Clerk's office sends the record to the Sixth Circuit, only if the panel requests it, which it did not. Moreover, the State Appellants failed to incorporate into the "joint" appendix, the trial transcript pages designated for inclusion therein by Defendants/Cross Plaintiffs and Plaintiffs in their respective appellate briefs. Thus, the only part of the trial transcript even considered by the panel of the Sixth Circuit were the few pages selected by the State Appellants for inclusion into their "joint" appendix.

VIII. BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

28 U.S.C. Section 1343(3)

28 U.S.C. Section 1331

42 U.S.C. Section 1983

IX. ARGUMENT

1.WHETHER THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW GOVERNING CORRECTIONAL INSTITUTIONS, WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, WHERE IT EXPRESSLY AUTHORIZED AS A MATTER OF FEDERAL CONSTITUTIONAL LAW STATE DEPARTMENTS OF CORRECTION WITHIN THE SIXTH CIRCUIT TO DELIBERATELY ALLOW INMATES SENTENCED TO STATE CUSTODY TO BACK UP AND LANGUISH FOR YEARS AT A TIME IN LOCAL COUNTY JAILS NOT DESIGNED FOR LONG TERM CONFINEMENT?

The following facts in this case are undisputed. All parties recognize that the Knox County Facilities are designed for housing pre-trial detainees, and misdemeanants and not for long term incarceration of sentenced felons. (R. 173: Mike Jenkins at T.R. 489; Jeff Reynolds at T.R. 99). The State is by statute responsible for housing T.D.O.C. sentenced felons. T.C.A. Section 41-1-506. The State should be responsible for these felons, and local jails cannot and should not be used to provide additional capacity for serious felons. (R. 173: Jeff Reynolds at T.R. 99). The State has made a deliberate choice to thrust its responsibilities for housing these inmates

to counties fully understanding that the back up in local jails would probably take place. (R. 173: Greg Maynard at T.R. 173-4). At the time of trial, the State had only added 300 beds to its prison system since 1981 and have constructed no new prisons since the 1985 Grubbs Order. (R. 173: Jeff Reynolds at T.R. 80-81). The State has taken no action to house their own prisoners. (Id. at 83). The State has deliberately allowed over 2,300 inmates to back up in local jail facilities. (Id. at 84-5). State sentenced inmates have remained in the Knox County Jail facilities continuously from between six months to two years, many never seeing the light of day. (R. 174: Charles Miller at T.R. 262; A.C. Willis at T.R. 240). This has caused the Knox County Jail facilities to go from never exceeding their Tennessee Corrections Institute rated capacities to continuously exceeding them. (R. 174: J. Miller at 157-58). On the day of the March 6 hearing, the Knox County Jail facilities had a rated capacity of 435, and a total inmate population of 501 out of which 147

were T.D.O.C. sentenced inmates. (R. 173: Kenneth Quindry at T.R. 22-3). The State's deliberate disregard of the rights of the inmates sentenced to State custody and rights of Knox County and Sheriff Fowler has been sanctioned by the panel decision in this case. The State has knowingly forced its inmates to live on the floor in cells lined with mattresses for months at a time with little room for exercise, no opportunity for outdoor exercise, no fresh air, and in many instances, not even windows. (R. 174: J. Miller at T.R. 151-3). The problems faced by Sheriff Fowler and his staff by being forced to house sentenced prisoners long term under such conditions is obvious. The district court, the Second Circuit in Benjamin v. Malcom, 803 F.2d 46 (2d Cir. 1986), and a previous panel of the Sixth Circuit in Tate v. Frey, 735 F.2d 986 (6th Cir. 1984), recognized what pathetic public policy this represents. The panel opinion in the instant case expressly authorizing the willful conduct of the State contravenes important public policy and mandates correction by this Court.

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS' DECISION RENDERED IN THIS CASE CONFLICTS WITH THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS IN BENJAMIN vs. MALCOM, 803 F.2d 46 (2nd CIR. 1986), AS WELL AS PRIOR SIXTH CIRCUIT PRECEDENT, WHERE FULL RELIEF FOR THE THIRD PARTY PLAINTIFF'S AND ORIGINAL INMATE PLAINTIFFS FOR UNCONSTITUTIONALLY OVERCROWDED LOCAL JAIL FACILITIES IN KNOX COUNTY, TENNESSEE CANNOT BE OBTAINED WITHOUT UPHOLDING THE PRECISELY TAILORED REMEDY IMPOSED BY THE DISTRICT COURT AGAINST THE ONLY PARTY RESPONSIBLE FOR AND CAPABLE OF RECTIFYING SUCH UNCONSTITUTIONAL OVERCROWDING?

In Benjamin v. Malcom, 803 F.2d 46 (2d Cir. 1986), the Second Circuit affirmed the District Court's grant of a preliminary injunction requiring the State of New York to remove "state ready" prisoners housed in the New York Correctional Facilities within 48 hours after their papers for transfer were completed. The facts as found by the District Court in Benjamin are indistinguishable from the facts of record in the instant case and as is found by the District Court. The Second Circuit noted in Benjamin that full relief against the unconstitutionally overcrowded conditions in the City Jail could not be obtained

through an Order against the City alone and further that the remedy of requiring the State to take prisoners for whom they had legal responsibility was a less extreme remedy than enjoining the City from arresting and prosecuting drug dealers and other criminals. Id. at 53. A previous panel of the Sixth Circuit reached the same result on similar facts in Tate v. Frey, 735 F.2d 986 (6th Cir. 1984). Notwithstanding that Tate is the most apposite case from the Sixth Circuit, the instant panel failed to even consider or discuss it in reaching the facially conflicting decision in this case. In shaping permanent injunctive relief to rectify constitutional violations, federal courts must tailor relief which is the least intrusive remedy, best accommodates concerns of federalism, closely tracks its findings and conclusions and places responsibility for rectifying the unconstitutional conditions on the responsible entity. As with the remedy crafted by the Courts in Benjamin and Tate, the district court's remedy in this case requiring the State to remove enough

state sentenced inmates to bring the Knox County Facilities within their rated capacity and to remove a state prisoner each time a newly sentenced prisoner reentered a Knox County Facility precisely meets these criteria. The well reasoned 61 and 11 page Memorandum Opinions of the district court fully explain and justify why the district court imposed the same remedies as did the Second Circuit in Benjamin and the previous panel of the Sixth Circuit in Tate. Even a cursory review of the record (which the instant panel of the Sixth Circuit failed to do) displays the ample support for the remedy imposed by the district court. In contrast, the analytically flawed, legally incorrect, factually unsupported and practically incomprehensible published opinion of the Court of Appeals divests jurisdiction of every District Court within Tennessee, except for one Judge in the Middle District, to order any relief against the State of Tennessee which impacts on the State prison population. The Opinion of the Sixth Circuit bars the doors to every district court in the State

of Tennessee, except for one Judge in the Middle District, from any challenge by an incarcerated litigant to the conditions of his confinement in a local jail facility.

The Court of Appeals concedes the accuracy of the District Court's findings of "historical facts" that, since the imposition of a cap on the State's prison population in 1985, the State has willfully chosen to allow its prisoners to languish for years at a time in local facilities designed for short term confinement rather than meet its responsibility to build additional prison space. Then, it expressly sanctions this pathetic correctional policy in direct conflict with the Second Circuit decision in Benjamin. This Court should accordingly exercise its discretion to resolve this conflict between the Circuits and reverse the Court of Appeals' authorization to the State of Tennessee to continue violating the constitutional rights of persons incarcerated in overcrowded local jails.

3. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS WHERE THE COURT OF APPEALS REVERSED THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS REGARDING THIRD PARTY "STATE" DEFENDANTS' ROLE IN PROXIMATELY CAUSING UNCONSTITUTIONAL CONDITIONS IN KNOX COUNTY JAIL FACILITIES WITHOUT REQUESTING OR REVIEWING THE TRANSCRIPT OF THE EVIDENCE IN THE DISTPICT COURT AND RATHER BY SUA SPONTE TAKING JUDICIAL NOTICE OF "FACTS" NOT CONTAINED IN THE RECORD?

The combined effect of the Court of Appeals' failure to review and rely on the transcript of the proceedings in the District Court with the panel's consideration of facts not contained in the record constitutes such a departure from appropriate appellate review as to require this Court to exercise its supervisory powers by granting certiorari review. An appellate court has no basis for evaluating a Court's findings of fact in the absence of evidence of record before the District Court. Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1052 (Fed.Cir. 1986). Obviously, without the benefit of a transcript of all the evidence taken by the District Court,

the Court of Appeals cannot make a meaningful evaluation of a claim of error. See Herron v. Rozelle, 480 F.2d 282, 288 (10th Cir. 1983). A court should decline appellate review without the benefit of a complete transcript of proceedings below. See Brattrud v. Town of Exline, 628 F.2d 1098, 1099 (8th Cir. 1980).

In this case, Knox County first learned that the panel of the Court of Appeals did not even consider or review the transcript of the evidence when counsel was advised by letter of January 11, 1990 from the Clerk of the Court of Appeals that the certified record was never sent from the District Court in Knoxville to the Court of Appeals in Cincinnati. (See Appendix, p. 49). The only portion of the transcript placed in the "joint" appendix prepared by the State Defendants were the few excerpts which the State Defendants felt supported their position. The State Defendants failed to include in the "joint appendix any of the transcript designated by either Knox County or the inmate Plaintiffs for inclusion in the joint appendix. Thus,

the panel of the Court of Appeals had only the one sided view of the evidence propounded by the state from which to assess the state's claim of error. That the panel of the Court of Appeals reviewed only those selected portions of the transcript submitted by the state is evident from its holding that the District Court's conclusion that the unconstitutional conditions of the Knox County facilities were the direct result of overcrowding caused by TDOC sentenced inmates was unsupported by the record. 887 F.2d. 1294. Even a cursory review of the record, had the panel felt inclined to make one, belies this ruling.

The panel's failure to review the record was exacerbated by its taking judicial notice of unwarranted factual conclusions having no support in the record. The presiding judge of the panel, Judge Merrit, took judicial notice both in this case and in the consolidated case of Dalton Roberts vs. Tennessee Department of Corrections, 89-5307 of his misbelief that the real cause of overcrowding in local county jails was a defacto conspiracy

between bondsmen and government officials to require bonds of indigent misdemeanants, which in Judge Merritt's opinion, should not be required to post a bond. (See transcript of ruling from the bench on March 16, 1989 at page 6, found in the appendix p. 64-65). The record in both cases is devoid of such evidence, and this judicially noticed "fact" is contrary to reality. However, Judge Merritt noted that this defacto conspiracy "was in existence when I came to the bar 30 years ago. It was in existence when my great grandfather came to bar 150 years ago." (Id). The result of Judge Merritt and the panel taking judicial notice of this erroneous "fact" manifests itself in the panel's statement that: "There was no showing of what effect an aggressive pre-trial release program for detainees charged with minor offenses would have on the inmate population of the county facilities." 887 F.2d. at 1294. If there was no evidence introduced on this point, the panel departed from accepted appellate review to surmise that had evidence on the point been introduced, the fact would have

been proven.

The combined effect of the panel's failure to review the transcript of the proceedings in the District Court together with its taking judicial notice of unproven and nonexistence "facts" is such a departure from proper appellate review as to warrant supervisory correction by this Court.

4. WHETHER THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF APPELLATE REVIEW AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS, WHERE THE PANEL DECIDED THE CASE ON ITS MERITS AFTER: ONE OR MORE OF THE MEMBERS OF THE PANEL WAS PRESENT IN ONE OR MORE SIXTH CIRCUIT RULE 18 SETTLEMENT CONFERENCES WITH SOME OF THE PARTIES; THE PANEL CONVENED A STATUS CONFERENCE ON THE PROPOSED SETTLEMENT; AND STATEMENTS, COMMENTS AND POSITIONS OF THE PARTIES AT THE CONCLUSION OF UNSUCCESSFUL SETTLEMENT NEGOTIATIONS WERE DISCLOSED TO THE PANEL BY BOTH OPPOSING PARTIES AND THE SIXTH CIRCUIT CONFERENCE ATTORNEY?

For the instant panel to have decided this case after having participated in settlement conferences and having been apprised that Knox County was the party who could not agree to a proposed settlement is in direct conflict with Federal Rule of Evidence 408 and the Sixth

Circuit's own local Rule 18 (3) and (4). Knox County objected to such disclosures and pointed out the clear conflict with the aforementioned rules as well as the potential prejudice to Knox County and the appearance of partiality to which this procedure would subject the court. (See appendix at page 60). The appearance of impropriety and partiality is aggravated by the fact that the panel's decision on the instant appeal resulted in the worst case scenario to Knox County: the Court's remanding for a probable finding of unconstitutionality of conditions in the local jail yet with instructions to the District Court to disregard evidence that the state, not Knox County, proximately caused the constitutional violation. The panel's extraordinary deviation from the accepted and usual course of appellate review in this case is compelling grounds for this Court to exercise its supervisory powers and grant certiorari.

5. WHETHER THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN HOFFMAN V. BLASKI, 363 U.S. 335 (1960) BECAUSE THE COURT ORDERED VENUE OF THIRD PARTY DEFENDANTS' CLAIM AGAINST THE "STATE" DEFENDANTS' TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1404(a) TO THE MIDDLE DISTRICT OF TENNESSEE NOTWITHSTANDING PLAINTIFF CARVER COULD NOT HAVE BROUGHT THIS ORIGINAL ACTION, IN THAT DISTRICT, AND THE STATE DEFENDANTS WAIVED ANY RIGHT TO A TRANSFER BY FAILING TO REQUEST ONE UNTIL THE MORNING OF THE LAST DAY OF THE BIFURCATED TRIAL OF THE CASE?

In Hoffman v. Blaski, 363 U.S. 335 (1960), this Court rejected the position adopted by the panel of the 6th Circuit that, if at the time of transfer, the transferee forum would have venue over the action, then it is one where the action might have been brought for purposes of 28 U.S.C. Section 1404(a). The Hoffman Court quoted with approval the Seventh Circuit's statement that:

> If when a suit is commenced, Plaintiff has a right to sue in that district, independently of the wishes of the Defendant, it is a district where the action might have been brought. If he does not have that right, it is not a district where it might have been brought, and it is immaterial that the Defendant

> subsequently makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum.

Id. at 344. (emphasis added). The panel readily conceded that Plaintiff Wayne Dillard Carver could not have instituted this action in the transferee forum, the Middle District of Tennessee. (Slip Opinion at p. 9). The cases relied upon by the panel with the exception of Wyndham Associates v. Bintliff, 398 F.2d. 614 (2nd Cir. 1968), cert. denied 393 U.S. 977 (1968), lend no support to transfer in this case because they all involved transfer to districts where the original action might have been brought. Both the Panel's decision in this case and the Second Circuit's decision in Wyndham are contrary to Hoffman. This Court in Hoffman rejected the claim that Section 1404 should be broadly construed beyond its unambiguous language to achieve the interest of justice. 363 U.S. 344. The Court held that no conduct of the Defendant after suit has been instituted

can add to the forums where an action might have been brought. Id. at 343. This includes conduct of the Defendant in impleading a third party action was error.

The Panel's ruling that the State did not waive objection to venue is also in direct conflict with Hoffman wherein the Court stated: "A Defendant properly served with process by a court having subject matter jurisdiction waives venue by failing seasonable to assert it..." 363 U.S. at 344.

Since the panel decision is direct conflict with the clearly established law announced by this Court in Hoffman, this Court should grant review in this case.

X. CONCLUSION

For each and all of the foregoing reasons, the Court should grant Petitioners Petition for Writ of Certiorari on each of the five issues presented therein.

Respectfully submitted this 7 day of March, 1990.

KNOX COUNTY AND
SHERIFF JOE FOWLER

BY: Robert H. Watson, Jr.
ROBERT H. WATSON, JR.

BY: John Duffy
JOHN C. DUFFY

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing has been served upon Mr. Charles Burson, Mr. Dean Rivken, and Mr. John Eldridge, by United States Mail, postage prepaid, this 7 day of March, 1990.

BY: John Duffy
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